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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL HERNANDEZ, Defendant and Appellant.	F056015 (Super. Ct. No. VCF170418A) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of the FACTS and parts IB through III of the discussion.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Louis M. Vasquez and Lloyd G. Carter, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Daniel Hernandez was charged, by fourth amended information, with murder committed by an active participant in a criminal street gang and carried out to further the activities of the gang, and perpetrated by means of discharging a firearm from a motor vehicle (Pen. Code,[1] §§ 187, subd. (a), 190.2, subd. (a)(21) & (22); count 1), attempted premeditated murder (§§ 187, subd. (a), 664; counts 2 & 3), and discharging a firearm from a motor vehicle at another person (§ 12034, subd. (c); counts 4-6). Criminal street gang and firearm use enhancements (§§ 186.22, subd. (b)(1)(C), 12022.53, subds. (b), (c), (d) & (e)(1), respectively) were alleged as to each count.[2] A jury convicted him of discharging a firearm from a motor vehicle at another person (counts 4-6), but acquitted him of murder (count 1), and deadlocked on the charges of attempted murder (counts 2 & 3). As to count 4, jurors found that a principal personally and intentionally discharged a firearm, causing death (§ 12022.53, subds. (d) & (e)(1)); as to counts 5 and 6, that a principal personally and intentionally discharged a firearm (*id*., subds. (c) & (e)(1)); and, as to counts 4-6, that the crime was committed for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)). Appellant was sentenced to prison for an aggregate term of 18 years 4 months, plus 25 years to life. The People elected not to seek retrial on the unresolved lesser included offenses of count 1, or on counts 2 and 3, and those counts were dismissed.

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1 All statutory references are to the Penal Code unless otherwise stated.

2 Jose Alfredo Ruiz was charged with appellant. Their trials were severed and Ruiz's case is not before us on this appeal.

Appellant filed a timely notice of appeal, and now raises various claims of error. In the published portion of this opinion, we will reject his claim the trial court misinstructed the jury by omitting the mental state element with respect to section 12034, subdivision (c). In the unpublished portion, we will reject his other claims of instructional error and his challenges to the insufficiency of the evidence and his sentence.

FACTS*

I

PROSECUTION EVIDENCE

Around 9:00 or 9:30 on the evening of September 12, 2006, David Stephen, Alex Ramos, and Lorenzo Leon were walking to Stephen's house in Terra Bella from a store a few blocks away. As they turned southbound on Road 237, a dark green Thunderbird passed them, heading north, and then turned toward the mountains on Avenue 96. Stephen and Ramos recognized it as appellant's car. When it first passed, Stephen could hear music coming from the vehicle, but not all that well. He and the others did not think anything was going to happen, as they were acquainted with appellant.

Stephen's group turned onto Camphor. The Thunderbird also turned down Camphor, and Stephen could hear the music more loudly. It was PBC ("Proud By Choice"), which was Norteno gang music and talked about "normal gang stuff" such as violence against Surenos and representing the Norteno color, which is red. The Sureno color is blue; Stephen and Leon were wearing dark blue shirts, while Ramos was wearing a white and blue shirt. Stephen and Ramos were affiliated with Surenos. Leon associated with Stephen and Ramos, but was not a gang member. The three had gone to

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* See footnote on page 1, *ante*.

Porterville High school, as had appellant and Jose Ruiz. According to Stephen, appellant was not affiliated when Stephen first knew him, but then, after appellant was shot in the leg, appellant began associating more with Northerners, the rivals of Southerners.[3] Ruiz was a northern gang member. Stephen occasionally saw appellant "throw" the number 4, which stood for 14 and was associated with Northerners, but there were never any problems between appellant and Stephen due to differences in their gang affiliations. This night was not the first time Stephen had heard Norteno music playing loudly from appellant's car, although Stephen did not hear it every time he saw the car.

Just after the car passed Stephen and his companions, somebody -- not appellant -- shouted "Norte" out the window. Stephen's group stopped, and the car stopped in the middle of the street, about a car's length from them. There was a passenger in the vehicle, but Stephen was unable to get a good look at him. Stephen still had no concern, as he and appellant, who was driving, had never had problems. Leon also recognized the car, and said there was nothing to worry about because it was appellant.

Leon walked up toward the passenger window, while Stephen waited by the back of the car. According to Stephen, Leon crouched down about three feet from the window. He looked inside and put up his hands, asking what happened and saying, "Daniel, I thought you didn't bang," and that is when the gunshot was fired. Stephen did not see the gun, but he saw the flash. Leon grabbed his chest and fell. Stephen did not hear appellant or the passenger say anything. He and Ramos began to run toward Stephen's house, and Stephen heard five or six more shots. He turned slightly and saw flashes coming from the car. The upper part of the passenger's body was hanging out of the window, facing their direction. The car remained stopped for perhaps three shots,

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[3] Witnesses referred to Norteno and northern, and Sureno and southern, interchangeably.

then Stephen reached nearby apartments and did not see anything more. He did not hear the car leave or any voices coming from it.

According to Ramos, Leon walked up to the passenger's window and asked what was going on. Ramos did not hear appellant or the passenger say anything, but then the hand of the passenger pulled out a gun and shot Leon, who grabbed his chest and fell to the ground. The car then took off. Ramos and Stephen ran up to Leon, who was unresponsive, then Stephen ran off to call the police. Ramos heard two shots and headed for Stephen's house.

Shortly after 10:00 p.m., Tulare County Sheriff's Deputy O'Neill and other officers were responding to a call in an alley south of Camphor, when O'Neill heard what sounded like a gunshot north of their location. O'Neill started running in that direction. When he reached the end of the alley, he saw what appeared to be muzzle flashes reflecting off of trees and houses across the street, and he heard approximately four or five additional shots. Only a few seconds elapsed between the first shot and the other ones. He also saw Ramos and Stephen running, and Leon lying in the street. Leon, who appeared to have been shot one or more times in the center of the chest, was breathing but unresponsive. He was subsequently pronounced dead at the scene.[4]

At 11:06 p.m., fire suppression personnel were dispatched to a vehicle fire southeast of Terra Bella. Upon arrival, they found a Ford Thunderbird on a dirt access road between two orange groves. The car, which matched the suspect vehicle in the homicide, was fully engulfed in flames.

At the same time Tulare County Sheriff's detectives were being notified of the car fire, Alejandro Hernandez was reporting a vehicle theft. As a result, Detective Hunt went

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[4] Leon died from a gunshot wound to the chest. Two blue bandannas were found in his pants pocket.

to appellant's residence on Pepper. As he arrived, a red pickup truck pulled up, and Alejandro Hernandez and appellant got out. Hunt learned that the car being reported stolen was a green 1997 Ford Thunderbird. Appellant said it was stolen from in front of the house and that he suspected a neighbor named Rene had taken it. After a field showup involving appellant and Alejandro Hernandez was conducted, Hunt arrested appellant and transported him to the sheriff's substation in Porterville.

Appellant was advised of his rights and gave a statement to Hunt and Detective Fernandez.[5] At first, he maintained that the Thunderbird had been stolen, and that he had been home, using the computer, for most of the evening. Appellant denied any knowledge of the shooting. He said that he was not capable of being involved with something like that, and that ever since he had gotten shot, he had been trying to get away from gangs.[6] Eventually, however, appellant said that what happened was a surprise. He denied that his having been shot was the motivation for what happened, and denied doing

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[5] A videotape of the interview was played for the jury.

[6] Appellant was shot in the knee on August 17, 2005. According to him, he told the police who did it, but nothing was done.

Tulare County Sheriff's Deputy Guy, who responded to the call, found appellant lying on the ground by some railroad tracks near Road 236 and Pepper. Appellant, who was wearing a red shirt, had suffered a shotgun wound to the leg. When interviewed at the hospital later that evening, appellant related that he was at home when he saw some South Siders at the railroad tracks, staring at his house. The subjects, whom he knew as "Fuzzy" and "Monkey," thought he was a northern gang member. Appellant said they had tried to jump him recently. Appellant said his friends were gang members, but he was not. He did, however, like the color red. Appellant said he had contacted Ponciano Ruiz to come over to his house. Once Ponciano Ruiz arrived, they decided to contact the subjects for disrespecting appellant by staring at his residence. As appellant walked over to them, he saw a shotgun by Monkey's feet. Appellant was undeterred, but then Monkey picked up the shotgun and shot him in the leg. Appellant was able to identify Abel Valencia from a photographic lineup. As law enforcement was unable to make contact with the suspects, however, the case was submitted to the district attorney for review. The suspects were never arrested.

the shooting. He said he went to pick "them" up, and that he knew Jose Ruiz was crazy and always carried guns.[7] Appellant related that he always carried one, too, but had it just for show.[8] Appellant said they were cruising around, with appellant driving, and there were three guys. They pulled up, and Ruiz pulled out the gun. He said, "hey, what's up," and looked at appellant "and he tell me, he [unintelligible] either shoot him, and he goes, and I told him, no, don't shoot him, and he just, he just turns back and he shoots him …." Appellant was shocked and never expected Ruiz to shoot. Appellant thought he was just going to shoot up in the air. Appellant related that he left his car by Ruiz's house, and "they" told him to change clothes and take a shower. Ruiz put the gun under a fence by some gas meters.

Appellant admitted knowing Ruiz had a gun; Ruiz told him. He did not tell appellant he was going to shoot, though. When Ruiz got in the car, he pulled out the gun, which he had tucked under his shirt, and started cleaning the bullets. Appellant had an idea he was up to something, but looked at him and judged him as shooting up in the air. Appellant admitted that Ruiz said "Norte" and Ruiz told appellant, as they were getting closer to the group, that "they had shot him." Appellant saw Ruiz shoot at the others. Appellant thought there were about three or four shots, but "things happened so quick" and he "wasn't expecting that."

Appellant stated that he did not have any problems with the person who was shot, although appellant knew who he was and knew he claimed South. However, Ruiz said the same person shot Ruiz's car with a shotgun a week or two before. Appellant had not thought Ruiz was a hardcore Norteno, and Ruiz said that if they got caught, he would

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[7] Appellant subsequently clarified that he and Ruiz were the only two in the car.

[8] In his testimony, appellant claimed the transcript was wrong and the video was inconsistent, as the order of events was wrong. According to him, he stated that he never carried a gun.

take the blame. Appellant denied even touching the gun. He did not know this was going to happen, and he thought the gun was just for show.

Appellant admitted having a red cap with a "T" on it, but it was from before he was shot. He had been "hanging with red" two or three years, but never got "jumped in." He denied having problems with Surenos; ever since he was shot, he tried to get away from them. He did not know why his assailant shot him; he had been wearing blue at the time. Appellant thought he may have said something about the assailant's mother that provoked him. Appellant admitted having fought Southerners, but said he had not been that way since before he got shot. Appellant no longer cared about it and was "not claiming." He admitted still hanging out with Nortenos, however.

A search warrant was executed at appellant's residence at about 3:30 a.m. on September 13. Several items of red clothing, including a United Farm Workers shirt, were found in his room, along with a CD that had "scrap music" handwritten on it.[9] Displayed in his room were some blue Dallas Cowboys items.

Appellant's computer was seized. A forensic examination revealed "terrabella4," the user name for a MySpace account that was created on September 12, 2006, at 1:28 p.m. A search for images related to north, south, the number 13, and the number 14 turned up a lot of pictures that had come from what appeared to be MySpace web pages. There were images related to both north and south. It appeared appellant was viewing MySpace web pages, as opposed to uploading images onto the Internet. From an examination of the computer, it was possible to tell the duration of the connection to Internet Explorer, which would be used to access MySpace, but not any log-ins or log-offs to MySpace itself. On September 12, Internet Explorer was running until about 9:51 p.m.

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9 "Scrap" is a derogatory term that Northerners call Surenos.

About 5:40 a.m. on September 13, detectives took appellant to Ruiz's house. Appellant showed them where he had left his car, and related that Ruiz had said he was going to burn it. A search of Ruiz's bedroom turned up several items of red clothing, including a red bandanna. A .357 revolver was found in the closet. Tests revealed that the bullet recovered from Leon's body during the autopsy was fired from this gun.

Tulare County Sheriff's Detective Ramirez testified as an expert on gangs.[10] He explained that a Northerner is someone who associates with the color red, number 14, and letter N. Nortenos also associate with the Huelga bird, the United Farm Workers symbol that they have adopted. A Southerner is someone who associates with the color blue and number 13. The two groups are rivals.

Ramirez researched appellant and Jose Ruiz in connection with this case. In his opinion, by using the number 4 in terrabella4, his MySpace address, appellant was indicating that he claimed the number 4, which would be Norteno.[11] On his MySpace page, appellant indicated that he liked the music of Baby Boy Ene. "Ene" represents the letter N; Baby Boy Ene is northern rap music that is degrading to Southerners and talks about how Northerners are going to kill Southerners and take over their territories. There was a survey on the web page that asked whether appellant had ever been beaten up. He wrote yes, but that it never went unsettled. Ramirez listened to the "scrap music" CD found in appellant's room; it was Norteno music that promoted the northern lifestyle and

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10 We do not recite Ramirez's testimony concerning, for example, the primary activities of Nortenos or predicate offenses, since there is no claim of insufficient evidence with respect to the gang enhancements.

11 Ramirez conceded that appellant had three brothers. He also conceded that appellant had a blue Cowboys flag and a number 31 Cowboys jersey hanging in his room, and that a northern gang member would usually cross out the 3 as a sign of disrespect. However, appellant listed Tierras as his location on his MySpace page. Ruiz was associated with the Tierras clique.

violence against Southerners. He also listened to the PBC ("Proud By Choice") CD; it contained music that was very derogatory toward southern gang members and talked about shooting and killing them.

According to Ramirez, there are 10 criteria for determining whether someone is a gang member. A person need only meet two unless he identifies himself as a gang member, in which case only one is needed. From everything he reviewed, Ramirez formed the opinion that appellant met several of the criteria for being a northern gang member. Specifically, he admitted association in a custodial facility.[12] He also associated with gang members, was involved in a gang-related crime, had gang clothing or attire, and wrote or possessed gang material. Ramirez found the images from appellant's computer to be relevant to his assessment due to the northern activity they contained. There were southern references on the MySpace photos as well, and almost as many Sureno depictions as Norteno ones. Some were very derogatory toward Nortenos. Ramirez could not say that appellant intentionally saved any of the items found in his computer; however, northern and southern gang members will look at each other's MySpace pages to gain information. Ramirez also formed the opinion that Jose Ruiz met multiple criteria for being a northern gang member. By contrast, Lorenzo Leon and Alex

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[12] When appellant was booked into jail in connection with this case, he filled out the standard inmate classification questionnaire. In response to the question whether he associated with any street or prison gangs, appellant marked "yes" and wrote "Northerners." Under "list all known enemies," he wrote "Surenos." When interviewed for classification, appellant was asked if he was a gang member or associate. He stated he was a Northerner. The questionnaire did not differentiate between associating with and being a member of a street gang.

Ramirez's opinion concerning the significance of the classification questionnaire was not changed by the fact that after initial classification, appellant was transferred into a non-Norteno cell and never returned to the Norteno-dominated cell. According to Ramirez, the cell he was changed to was a northern dropout tank whose occupants were still Northerners, just not active members.

Ramos associated with a southern gang, while David Stephen admitted being a southern gang member.

In Ramirez's opinion, a shooting of a Norteno by a Sureno would not go unanswered or unsettled. Moreover, if a Norteno gets in a fight with a Sureno and another Norteno is also present, that Norteno will jump in and assist the first Norteno, basically backing him up. A Norteno would not take a witness along when committing a crime unless it was a comrade who was backing him up. In response to a hypothetical question incorporating the prosecution's version of the evidence in this case, Ramirez opined that the crime was committed in association with, and for the benefit of, the Norteno gang. Ramirez also opined that the shooting would promote or further the gang's conduct. Ramirez conceded, however, that he knew of no communication between appellant and Ruiz about any type of plan relative to what was going to occur on the evening of the shooting, any encouragement or directions appellant gave to Ruiz before Ruiz pulled the trigger, or any proof that appellant had any knowledge of what was going to occur until such time as Ruiz pulled the trigger.

II

DEFENSE EVIDENCE

Alejandro Hernandez, appellant's brother, identified the United Farm Workers and other red shirt seized during the search of appellant's residence as belonging to their father. Hernandez had never seen appellant wear either shirt. If those shirts were found on appellant's bed, it was probably because their mother mistakenly left them there when she was doing laundry. Hernandez never discussed gang involvement with appellant or saw him associate with gang members, but did see appellant wear blue clothing. Appellant had a blue Cowboys jersey with the number 31 on it. According to Hernandez, appellant was not a Norteno.

Michael Hurtado, a former gang member who had since obtained multiple college degrees that involved the study of gangs and who was in a doctorate program, testified as an expert on gangs. He was familiar with the 10-point criteria used by law enforcement to identify whether someone is a gang member. Hurtado did not believe that appellant's answers on the classification form constituted an admission of gang membership; instead, the purpose of the questions was the safety of officers and inmates. With respect to the images on appellant's computer, they were about equal in terms of Norteno and Sureno symbols. Some were exceedingly negative and disrespectful from the point of view of the northern belief system. Hurtado would not expect someone who was considered to be a Norteno gang member to have those types of images. In addition, Nortenos would probably tell appellant that he could not wear a jersey bearing the number 31, because it contained the number 3. In Hurtado's opinion, no Norteno gang member would wear a blue Dallas Cowboys jersey with the number 31 in public, nor would he have it displayed in his room as appellant did. Hurtado acknowledged that appellant also had a blue Cowboys jersey bearing the number 41 displayed, but felt the fact it had the same numerals as 14 did not overcome the fact it was blue. In response to a hypothetical question incorporating the defense's version of the evidence in this case, Hurtado opined that there was "major doubt" whether the shooting was committed for the benefit of, or in association with, a criminal street gang.

Appellant, who was 20 years old at the time of trial, testified that being shot when he was 17 had a large impact on his life. He kept a picture of his leg as a reminder. Appellant wore clothing of different colors. He wore his blue Cowboys jersey to school and in public many times, even though he got "flak" from people he knew to be associated with Nortenos and once got into a fight with a Northerner. Before appellant was shot, he associated with Nortenos in that he hung around with them and talked to them, but he did not participate in crimes with them or back them up in fights. He also

hung around with and talked to Southerners. After the fight and the shooting, appellant stopped hanging around with northern and southern gang members, although he still saw them in places and would say hello.

According to appellant, the red shirts found in his room belonged to his father, who associated with the United Farm Workers. Appellant used "terrabella4" for his MySpace page because Terra Bella was where he lived, and the 4 stood for the four Hernandez brothers. The statement on his MySpace page about nothing going unsettled meant that he did not go looking for trouble, but would defend himself when he had to. The images found in his computer were not intentionally generated or saved by him. Although appellant had looked at the MySpace pages of people with southern connections, he did not do so with the intent of gathering information on his enemies. Appellant listened to Norteno and Sureno music; he was not making a statement, but, as a musician himself, liked hearing rhythms.

Appellant had gone to school with Jose Ruiz since sixth grade. He did not think Ruiz was involved in crimes, and believed he merely hung around with gang members. Appellant knew Stephen from school and believed him to be a Sureno gang member. The two had no conflicts, however, and appellant sometimes tried to help Stephen and tell him to stay away from gangs. Appellant was also acquainted with Ramos and Leon, and had no conflict with either of them.

On the night of the events in this case, Ruiz telephoned appellant and asked if he wanted to go cruising, meaning just driving around town. It did not mean they were looking for trouble. Appellant picked Ruiz up about 8:30 p.m., and they made quite a few circuits of Terra Bella, which is a small town and in which practically everyone knew appellant's car. As they drove, they talked about what they were doing that summer. Appellant was under a lot of pressure, and cruising helped relieve his stress.

About five minutes after they started cruising around, Ruiz took out a revolver that he had in his waistband with his shirt over it, and started cleaning the bullets with his shirt. After less than a minute, Ruiz loaded the revolver up and put it away. Appellant got a little nervous, but thought Ruiz was trying to show it off. Appellant had heard that Ruiz had guns, but this was the first time appellant had seen that gun. When appellant himself was shot, he never got a gun to start hunting the perpetrator down. Instead, he left it up to the authorities. It was a painful experience for him and his family, and he did not wish it on anyone else. When appellant saw the perpetrator around town, he notified his father, who called the authorities. When Ruiz took out the gun, appellant did not expect anything bad to happen. It did not occur to him that Ruiz might have a plan to go out and shoot somebody. Ruiz never communicated any such plan to appellant, and appellant never gave him any encouragement. Ruiz was not wearing anything to indicate he had some type of gang motive that evening, nor was appellant.

At some point, Ruiz told appellant to pull over. As appellant did so, the other group came into view. Right before they pulled over, Ruiz told appellant that one of them had shot at him a few days earlier.[13] As appellant stopped, and before the others passed the car window, Ruiz yelled out, "what's up." Only a couple seconds elapsed between when Ruiz told appellant about the prior incident and when he called out to the others; everything happened quickly. Appellant had no time to say he did not want any problems.

Leon stopped right before he passed the window. Appellant did not remember whether he crouched down as if he wanted to talk to those in the car, but recalled seeing his hand motion like "what's going on" or "what's happening." Appellant had a local rap

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[13] On cross-examination, appellant said the car was already stopped when Ruiz quickly said that one of the group had shot him, then said "what's up" through the window.

station playing on the radio; it was not Norteno music, although he was playing it loud enough to hear out the windows. Nobody said anything to him like, "I thought you didn't bang, Daniel." The group did nothing to provoke appellant or Ruiz; appellant had no issues with them.

Leon raised his hands as if in a question. He looked confused. Neither appellant nor Ruiz said anything like "Norte." However, just before Leon said "what's happening," Ruiz turned and asked appellant if he should "book this guy." Appellant thought he meant shoot him, and told Ruiz no. Ruiz fired anyway. Appellant estimated the entire sequence of events took about five seconds and occurred around 20 minutes after appellant first saw the gun. When Ruiz turned back around after appellant told him not to shoot, Ruiz was going to shoot and appellant thought he was going to shoot up in the air. Instead, he turned around and shot a person. Appellant did not encourage Ruiz to shoot at the others; he was surprised by what happened.

Appellant did not throw Ruiz out of his car because he was scared. He was in shock and did not know what to do. It occurred to him that everyone knew him and his car and so the others would be able to identify him, but, knowing that, he did not plan to do anything. It was Ruiz's idea to burn the car. Appellant did not know what else to do. Appellant's brother was the one who called the police because the car was not there. Appellant did not tell his brother where the car was at. He initially lied to the authorities, but then told them the truth. Appellant did not report the shooting to the police because he was afraid of retaliation from gangs.

Appellant denied knowing Ruiz was going to shoot or hurt anyone. Appellant never touched the gun. Appellant denied ever claiming Norteno membership. Although he occasionally associated, he never participated in any crime or backed them in a fight. When he wrote "Northerners" on the jail classification form, he meant that he hung around with them and talked to them. It never occurred to him that that would be used to

make him a member of a gang. He listed Surenos as his enemies, because he was shot by a Southerner. However, that was not a gang-related crime. Appellant and the person who shot him would "talk[] smack" to each other when their paths crossed, but nothing gang related. Appellant knew the shooter was Sureno and had a shotgun, but still confronted him about looking at appellant's house. Appellant said something about his mother. Appellant, who had never been in custody or filled out a classification form before, asked to be moved as soon as he found out he was in a Norteno tank. He was removed from that tank about eight or nine hours later. He was then placed in solitary confinement for 30 days, then moved to a protective custody dropout unit.

DISCUSSION

I

JURY INSTRUCTIONS

A. Mental State Requirement

Appellant was the driver of the vehicle from which the shots were fired. Ruiz, his passenger, was the actual shooter. All three victims, who were on foot, were within about a car's length of the vehicle when it stopped upon passing them. One, Lorenzo Leon, approached the passenger window and asked appellant and Ruiz what was going on. Appellant testified that, although he knew Ruiz had a gun, he did not know he intended to shoot at anyone. In fact, when Ruiz turned to him and asked whether he should "book" (shoot) Leon, whom Ruiz suspected of involvement in an earlier shooting, appellant told him not to. When Ruiz turned back around and appellant realized he was going to shoot, appellant thought he would shoot up in the air. Instead, Ruiz fired multiple rounds, one of which struck Leon in the chest, killing him. Leon's two companions escaped unharmed.

Appellant was tried as an aider and abettor. With respect to counts 4, 5, and 6, jurors were instructed, pursuant to CALCRIM No. 968: "To prove that the defendant is

guilty of this crime, … the People must prove that, one, Jose Ruiz willfully and maliciously shot a firearm from a motor vehicle; two, Jose Ruiz shot the firearm at another person who was not in a motor vehicle; and, three, the defendant aided and abetted commission of that crime." Jurors were further instructed: "Someone commits an act willfully when he does it willingly or on purpose. [¶] Someone acts maliciously when he intentionally does a wrongful act or when he acts with a wrongful intent to disturb, annoy or injure someone." Jurors also were told that violation of section 12034, subdivision (c) was a general intent crime.

Appellant now says that, because a greater punishment is imposed on those who shoot from a car at another person in violation of subdivision (c) of section 12034, as opposed to those who merely shoot from a car in violation of subdivision (d) of the statute, the intent to fire at another person is an element of the offense of which appellant was convicted in counts 4, 5, and 6. Accordingly, appellant argues the prosecution was required to prove that appellant aided Ruiz with an intent to shoot at another person; however, the instructions as given allowed the jury to convict if it found Ruiz in fact fired at another person, appellant knew Ruiz intended to fire a gun from the car, and appellant aided in the commission of the crime. Thus, appellant asserts the jury could have convicted him without ever finding he knew Ruiz actually intended to shoot at another person and shared that intent. Because appellant at most believed Ruiz was going to shoot up in the air, the argument runs, the instructions removed a disputed element from the jury's consideration and require reversal. We find no error.

"The law imposes on a trial court the sua sponte duty to properly instruct the jury on the relevant law and, as such, requires the giving of a correct instruction regarding the intent necessary to commit the offense and the union between that intent and the defendant's act or conduct. [Citations.]" (*People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1185.) We independently assess whether instructions correctly state the law

(*People v. Posey* (2004) 32 Cal.4th 193, 218), keeping in mind that "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] '[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial.' [Citation.] 'The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.' [Citation.]" (*People v. Burgener* (1986) 41 Cal.3d 505, 538-539, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 756.)

We first determine the mental state required for the actual perpetrator. "The actual perpetrator must have whatever mental state is required for [the] crime charged …." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) It appears to us that appellant is seeking to impose some sort of specific intent requirement on those who violate section 12034, subdivision (c) as direct perpetrators. This is not the law.

Section 12034, subdivision (c) prescribes punishment for "[a]ny person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle …." "Conviction under a statute proscribing conduct done 'willfully and maliciously' *does not require proof of a specific intent*. [Citation.]" (*People v. Licas* (2007) 41 Cal.4th 362, 366, italics added [discussing whether assault with a firearm, a violation of § 245, subd. (a)(2), is a lesser included offense of § 12034, subd. (c)]; see *People v. Atkins* (2001) 25 Cal.4th 76, 85-86; *People v. Alvarado, supra,* 125 Cal.App.4th at p. 1188.) "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intent is deemed to be a general criminal intent.… The only

intent required for a general intent offense is the purpose or willingness to do the act or omission. [Citation.]" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1166-1167.)

The fact subdivision (c) of section 12034 requires that the perpetrator shoot "at" a particular target does not transform the crime into a specific intent offense. Cases construing section 246, which prohibits "maliciously and willfully discharg[ing] a firearm at an inhabited dwelling house" or other specified targets, are instructive. The crime proscribed by section 246 is analogous to that proscribed by section 12034, subdivision (c), which was patterned on section 246. (*People v. Licas*, *supra*, 41 Cal.4th at p. 367, 368, fn. 2.)

It is settled that a violation of section 246 is a general intent crime. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985, fn. 6; *People v. Overman* (2005) 126 Cal.App.4th 1344, 1356 (*Overman*); *People v. Watie* (2002) 100 Cal.App.4th 866, 879.) "'As for all general intent crimes, the question is whether the defendant intended to do the proscribed act.' [Citation.] 'In other words, it is sufficient for a conviction if the defendant intentionally did that which the law declares to be a crime.' [Citation.]" (*Overman*, *supra*, 126 Cal.App.4th at p. 1356.)

In *Overman*, the defense to a section 246 charge was that the defendant did not shoot "at" anything or anyone, but instead merely discharged his gun into the air. (*Overman*, *supra*, 126 Cal.App.4th at p. 1354.) The Court of Appeal noted that "[i]n the words of the statute, section 246 is violated when a defendant intentionally discharges a firearm 'at … inhabited dwelling house, occupied building ….'" (*Overman*, at p. 1356.) The court rejected the argument that the trial court should have instructed jurors that the statute's "intent" element is satisfied only if a defendant shoots directly "at" one of the listed targets. (*Id.* at p. 1355.) In so doing, the court reviewed the opinion in *People v. Chavira* (1970) 3 Cal.App.3d 988, 992-993, in which the defendant unsuccessfully argued the evidence was insufficient to support his section 246 conviction, because he did

not fire several shots "at" a dwelling, but rather "at" the people congregated in front of the building. The *Overman* court concluded: "As *Chavira* demonstrates, section 246 is not limited to the act of shooting directly 'at' an inhabited or occupied target. Rather, the act of shooting 'at' a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it. The defendant's conscious indifference to the probability that a shooting will achieve a particular result is inferred from the nature and circumstances of his act." (*Overman, supra,* 126 Cal.App.4th at pp. 1356-1357, fn. omitted.) The court also concluded: "Section 246 does not require a specific intent '"to do a further act or achieve a future consequence"' beyond the proscribed act of shooting 'at' an occupied building or other proscribed target. [Citation.] In other words, the statute does not require a specific intent to achieve a particular result (e.g., strike an inhabited or occupied target, kill or injure). [Citation.] Instead, the statute only requires a shooting under facts or circumstances that indicate a conscious disregard for the probability that one of these results will occur." (*Overman*, at p. 1357, fn. omitted.)

The elements of a violation of section 246 are "(1) acting willfully and maliciously, and (2) shooting at an inhabited house. [Citation.]" (*People v. Ramirez, supra,* 45 Cal.4th at p. 985, fn. omitted, citing CALCRIM No. 965.) It follows that the elements of a violation of section 12034, subdivision (c) are (1) acting willfully and maliciously, and (2) shooting from a motor vehicle at a person outside a motor vehicle. CALCRIM No. 968 informed the jury of these elements. The necessary intent of the shooter was conveyed through the requirement that the firearm must have been discharged willfully and maliciously, terms that were defined for the jury.

As previously noted, appellant was tried as an aider and abettor. An aider and abettor "must 'act with knowledge of the criminal purpose of the perpetrator *and* with an

intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] The jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense ….' [Citations.]" (*People v. Mendoza*, *supra*, 18 Cal.4th at p. 1123; *People v. Beeman* (1984) 35 Cal.3d 547, 560.) In order for aiding and abetting liability to attach, the intent to render aid must be formed prior to or during commission of the offense. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.)

Pursuant to CALCRIM No. 401, appellant's jury was instructed in part: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove four things: [¶] One, the perpetrator committed the crime; two, the defendant knew that the perpetrator intended to commit the crime; three, before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and, four, the defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to and does, in fact, aid, facilitate, promote, encourage or instigate the perpetrator's commission of that crime."

Appellant does not contend the instructions on aiding and abetting incorrectly conveyed the requisite mental state of an aider and abettor; in fact, he concedes they were adequate. Jurors were instructed that to convict appellant of violating section 12034, subdivision (c), they had to find, inter alia, that he aided and abetted commission of that crime. That the mental state requirement for aiding and abetting was not repeated in conjunction with CALCRIM No. 968 is immaterial, as jurors were also told to consider the instructions together. It is axiomatic that "[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's

instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) There was no error.[14]

B. Lesser Included Offense[*]

Appellant's jury was instructed on assault with a firearm as a lesser included offense of section 12034, subdivision (c), and on simple assault as a lesser offense to assault with a firearm.[15] It was not, however, instructed on violation of subdivision (d) of section 12034 as a lesser included offense. That provision states: "Except [as not applicable here], any person who willfully and maliciously discharges a firearm from a motor vehicle is guilty of a public offense …." Violation of subdivision (c) of section 12034 is a felony punishable by imprisonment for three, five, or seven years; violation of subdivision (d) of the statute is a wobbler punishable in the county jail for not more than one year or in state prison. Appellant says that because the jury could have found he

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[14] Appellant points to the prosecutor's argument, in which she stated: "Now we move on to Counts 4, 5 and 6, the … shooting from the vehicle at the three; must prove that Jose willfully and maliciously shot a firearm from the Thunderbird. [¶] We know that.… Jose Ruiz shot the firearm at another person who was not in a motor vehicle, and that's been applied to each separate count …, and that the defendant aided and abetted the commission of this crime, shooting from a motor vehicle. [¶] … [T]he evidence that supports those, Counts 4, 5 and 6, *the fact that he knew at the very least he was gonna shoot up in the air, shooting up in the air, shooting from a motor vehicle, 4, 5 and 6, guilty on 4, 5 and 6 from his words* …." (Italics added.) We are not convinced the prosecutor misstated the law. Assuming she did, however, appellant did not object; moreover, jurors were told to follow the court's instructions if they conflicted with what the attorneys said.

[*] See footnote on page 1, *ante*.

[15] The instructional conference was held off the record. We can only surmise that the instruction on assault with a firearm was given under the authority of this court's opinion in *In re Edward G.* (2004) 124 Cal.App.4th 962, 968, which held that such an offense is necessarily included in a violation of section 12034, subdivision (c). However, the California Supreme Court disapproved that holding in *People v. Licas*, *supra*, 41 Cal.4th at page 370, exactly one year before appellant's jury was instructed.

thought Ruiz was only going to shoot in the air, instructions on section 12034, subdivision (d) were required, and their omission violated his state and federal constitutional rights.

We apply the independent or de novo standard of review to a trial court's failure to instruct on an assertedly lesser included offense. (*People v. Licas, supra*, 41 Cal.4th at p. 366.) "A trial court has a sua sponte obligation to instruct the jury on any uncharged offense that is lesser than, and included in, a greater charged offense[.]… An uncharged offense is included in a greater charged offense if either (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), or (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test). [Citations.]" (*People v. Parson* (2008) 44 Cal.4th 332, 348-349, italics omitted.)

A trial court's sua sponte obligation to instruct on a lesser included offense arises "only if there is substantial evidence supporting a jury determination that the defendant was in fact guilty only of the lesser offense. [Citations.]" (*People v. Parson, supra,* 44 Cal.4th at pp. 348-349.) "'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could … conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) In deciding whether substantial evidence exists, courts should not evaluate the credibility of witnesses (*ibid.*); "[t]he testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct on its own initiative. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) By contrast, a "trial court need not … instruct the jury on the existence and definition of a lesser and included offense if the evidence was such that the defendant, if guilty at all, was guilty of the greater offense. [Citations.]" (*People v. Kelly* (1990) 51 Cal.3d 931, 959.) Thus, "when the evidence, even construed most favorably to the defendant, would not support a

finding of guilt of the lesser included offense but would support a finding of guilt of the offense charged," an instruction on a lesser included offense should not be given. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 795-796.)

It seems clear that, under the elements test, a violation of subdivision (d) of section 12034 is a lesser and necessarily included offense of subdivision (c) of the statute. We do not see any way in which a person can "willfully and maliciously discharge[] a firearm from a motor vehicle at another person other than an occupant of a motor vehicle," as proscribed by section 12034, subdivision (c), without necessarily "willfully and maliciously discharg[ing] a firearm from a motor vehicle," as proscribed by subdivision (d) of the statute.[16] This being the case, it is not enough to suggest, as respondent does, that any error in failing to instruct on the lesser offense was harmless because the jury convicted appellant of the greater offense. (See *People v. Hughes* (2002) 27 Cal.4th 287, 365; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 352.)[17] If that were the answer, failure to instruct on a lesser included offense would never constitute prejudicial error.

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[16] In *People v. Speegle* (1997) 53 Cal.App.4th 1405, 1415-1417, the appellate court held that when the acts alleged as constituting the felony offense are identical to the acts that constitute the misdemeanor, and the mental state for the two offenses is identical, the misdemeanor offense is "lesser" only in terms of penalty. In such a situation, a defendant who is guilty of the lesser offense is also guilty of the greater; hence, a trial court is not required to instruct on the misdemeanor as a lesser included offense of the felony. *Speegle* does not control here because the act required for a felony violation of section 12034, subdivision (c) is not identical to, but goes beyond, the act required for a misdemeanor violation of section 12034, subdivision (d).

[17] *Ramkeesoon* has been implicitly overruled by *People v. Breverman*, *supra*, 19 Cal.4th at page 165, with regard to the standard of prejudice applicable to failure to instruct on a lesser included offense.

Be that as it may, we conclude the trial court here did not err by failing to instruct on section 12034, subdivision (d) as a lesser offense with respect to counts 4, 5, and 6. Again by analogy to section 246, and as previously discussed, subdivision (c) of section 12034 "is violated when a defendant intentionally discharges a firearm either directly at a proscribed target … or in close proximity to the target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons … around it. No specific intent to strike the target, kill or injure persons, or achieve any other result beyond shooting at or in the general vicinity or range of the target is required." (*Overman, supra*, 126 Cal.App.4th at p. 1361.) Thus, appellant did not have to know Ruiz was going to shoot directly at the victims; indeed, Ruiz did not need to specifically so intend.

This is not a situation in which the alleged victims were, for example, across the street or some other appreciable distance from the shooter. Stephen testified that he was near the back of appellant's vehicle when the first shot was fired, while Leon was crouched down about three feet from the passenger window. Appellant told detectives that he pulled up next to the victims. Appellant testified at trial that when he pulled over and Ruiz yelled out "what's up," Leon stopped right before he passed the passenger window. Appellant could not remember whether he crouched down to talk, but did recall seeing his hand motion as if to ask what was going on. Appellant could see Leon despite the fact it was dark and, although appellant was playing his car radio loud enough for it to be heard outside the car windows a bit, he could hear Leon speak to Ruiz. By his own admission, in his trial testimony, appellant thought Ruiz was going to shoot into the air. This means he realized Ruiz was going to shoot, and he knew there were potential targets in very close proximity to the vehicle and, hence, the firearm.

In light of the foregoing, neither appellant's testimony nor any other evidence afforded any basis for an intermediate verdict. Even when construed most favorably to

appellant, the evidence did not merely show a shooting from a motor vehicle with people in the general vicinity, such that a jury reasonably could have found Ruiz did not shoot "at" another person within the meaning of section 12034, subdivision (c); instead, the people were at most a few feet away. (Compare *Overman*, *supra*, 126 Cal.App.4th at pp. 1362-1363.) Under the circumstances of this case, a jury could not have found appellant aided and abetted a shooting from a motor vehicle without also finding that he aided and abetted a shooting from a motor vehicle at someone not in a motor vehicle. In short, if appellant aided and abetted Ruiz at all, he aided and abetted the greater offense. Accordingly, instructions on section 12034, subdivision (d) were not warranted and their omission did not constitute error. (See *People v. Kelly*, *supra*, 51 Cal.3d at p. 959.)

C. CALCRIM No. 224

The trial court instructed the jury on direct and circumstantial evidence, including what each was, that both were acceptable types of evidence, and that neither was entitled to any greater weight than the other. Pursuant to CALCRIM No. 224, the court further told jurors:

> "Now, before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced the People have proved each fact essential to that conclusion beyond a reasonable doubt.
>
> "Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."[18]

[18] The court also gave CALCRIM No. 225, which contains essentially the same language with respect to proof of intent or mental state.

Focusing primarily on evidence proffered on the issue of whether the shootings were gang-motivated and the accompanying gang allegations, appellant says it was "fundamentally improper" to limit the instruction's cautionary principles to the jury's evaluation of circumstantial evidence where, as here, the record contained "sharply conflicting interpretations" of the prosecution's direct and circumstantial evidence. Under the circumstances of this case, the argument runs, the trial court's provision of CALCRIM No. 224 was unconstitutional, because, "by explicitly limiting the quoted principles to *circumstantial* evidence, the instruction[] logically told the jurors that these principles did *not* apply to *direct* evidence."

"The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid [instructing in such as way] as to lead the jury to convict on a lesser showing than due process requires." (*Victor v. Nebraska* (1994) 511 U.S. 1, 22.) "The constitutional question … is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [beyond-a-reasonable-doubt] standard." (*Id*. at p. 6.)

In *People v. Anderson* (2007) 152 Cal.App.4th 919 (*Anderson*), the Third District Court of Appeal rejected a claim that CALCRIM No. 224 gives the false impression the principles it states apply only to circumstantial evidence. (*Anderson*, at p. 931.) The court stated:

> "Defendant misreads the instruction. CALCRIM No. 224 does not set out basic reasonable doubt and burden of proof principles; these are described elsewhere. Although the instruction reiterates that each fact necessary for conviction must be proved beyond a reasonable doubt, the obvious purpose of the instruction is to limit the use of circumstantial evidence in establishing such proof. It cautions the jury not to rely on circumstantial evidence to find the defendant guilty unless the only reasonable conclusion to be drawn from it points to the defendant's guilt. In other words, in determining whether a fact necessary for conviction has been proved beyond a reasonable doubt, circumstantial evidence may be relied on only

> if the only reasonable inference that may be drawn from it points to the defendant's guilt.
>
> "The same limitation does not apply to direct evidence. Circumstantial evidence involves a two-step process: presentation of the evidence followed by a determination of what reasonable inference or inferences may be drawn from it. By contrast, direct evidence stands on its own. It is evidence that does not require an inference. Thus, as to direct evidence, there is no need to decide whether there is an opposing inference that suggests innocence." (*Anderson*, at p. 931.)

In *People v. Ibarra* (2007) 156 Cal.App.4th 1174 (*Ibarra*), we followed *Anderson* in rejecting a challenge to CALCRIM No. 224's "'intentional omission' of direct evidence from its scope." (*Ibarra*, at p. 1186.) We noted that direct evidence and circumstantial evidence are not similarly situated, and agreed with *Anderson* that where direct evidence is concerned, "no need ever arises to decide if an opposing inference suggests innocence. [Citation.]" (*Ibarra*, at p. 1187.)

Appellant acknowledges that *Anderson* and *Ibarra* upheld the propriety of CALCRIM No. 224, but says they do not affect the outcome here because neither the opinions nor the briefing discuss (1) any direct evidence, let alone direct evidence subject to more than one interpretation; or (2) the California Supreme Court's opinion in *People v. Vann* (1974) 12 Cal.3d 220 (*Vann*).[19] Appellant misunderstands the nature of the evidence presented and significantly misreads *Vann*.

Appellant says that in order to prove the shooting was gang-motivated and the gang enhancement allegations, the prosecution presented both direct and circumstantial evidence that appellant was a member of the Norteno criminal street gang. As direct evidence from which he says a reasonable conclusion could be drawn that was consistent

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19 Pursuant to Evidence Code section 452, subdivision (d), and there being no opposition from respondent, we grant appellant's application for judicial notice of the appellants' opening briefs in *Anderson* and *Ibarra*.

with innocence, appellant points to his admission, on his inmate classification form, that he associated with Northerners.

Direct evidence is "evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." (Evid. Code, § 410.) Appellant's admission on the classification form was direct evidence that he associated with Northerners. That association, however, was only circumstantial evidence that he was a member of the Norteno criminal street gang. Thus, the premise of appellant's argument is faulty and fails to demonstrate that *Anderson* and *Ibarra* are not dispositive.

Appellant's reliance on *Vann* is also flawed. As support for his claim that, by explicitly limiting the stated principles to circumstantial evidence, CALCRIM No. 224 logically but erroneously told jurors the principles did not apply to direct evidence, appellant quotes this portion of *Vann*: "An instruction which requires proof beyond a reasonable doubt only as to circumstantial evidence, rather than importing a need for the same degree of proof where the crime is sought to be established by direct evidence, might with equal logic have been interpreted by the jurors as importing the need of a lesser degree of proof where the evidence is direct and thus of a higher quality." (*Vann, supra*, 12 Cal.3d at pp. 226-227.)

In the first place, the applicable standard now for determining whether instructional error occurred is "reasonable likelihood," not "might." (*Victor v. Nebraska, supra,* 511 U.S. at p. 6.) More importantly, and what appellant completely ignores, is that *Vann* addresses a situation in which "the trial court failed to include in its charge to the jury *any* specific instruction that the defendants were presumed to be innocent and that the prosecution had the burden of proving their guilt beyond a reasonable doubt." (*Vann, supra*, 12 Cal.3d at p. 225, italics added.) The portion of the opinion quoted by appellant responds to the People's argument that the omission did not constitute

prejudicial error because the point was otherwise covered and the jury aware that the People were required to prove the defendants guilty beyond a reasonable doubt. As support for that proposition, the People relied on the circumstantial evidence instruction (presumably, CALJIC No. 2.01, the CALJIC counterpart to CALCRIM No. 224, or its predecessor), but the California Supreme Court found the instruction failed to tell jurors that a determination of guilt resting on direct evidence also must be resolved beyond a reasonable doubt. (*Vann*, at p. 226.)

Appellant has cited no case, and our independent research has found none, suggesting -- and nothing in *Vann* suggests -- that CALCRIM No. 224 is faulty where it is accompanied by standard instructions on the presumption of innocence and reasonable doubt, such as were given at appellant's trial.[20] Indeed, the California Supreme Court has, since 1945, imposed on trial courts the obligation of giving such an instruction without request (*People v. Bender* (1945) 27 Cal.2d 164, 174-175, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110; see also *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49-50), and has repeatedly and consistently rejected claims the

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[20] Appellant's jury was instructed: "[Appellant] is presumed to be innocent. This presumption requires that the People prove him guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal. You must find him not guilty." The trial court also told the jurors: "And, ladies and gentlemen, in virtually every definition of the crime, I've given you a number of elements, one, two, three, four, sometimes and five. Understand that each one of those elements must be proved beyond a reasonable doubt. It is somewhat like an arithmetic equation. Each element must be proven beyond a reasonable doubt."

instruction is unconstitutional (e.g., *People v. Friend* (2009) 47 Cal.4th 1, 53; *People v. Kelly* (2007) 42 Cal.4th 763, 792; *People v. Lewis* (2006) 39 Cal.4th 970, 1068; *People v. Koontz* (2002) 27 Cal.4th 1041, 1084-1085). Jurors here were directed to consider the instructions together, and we presume they did so. (*People v. Sanchez, supra,* 26 Cal.4th at p. 852.) We find no reasonable likelihood they applied the instructions in the way appellant claims. (See *People v. Davis* (1995) 10 Cal.4th 463, 521.)

II

SUFFICIENCY OF THE EVIDENCE

Appellant says that, even assuming the jury was properly instructed, the evidence was insufficient to support his convictions. We disagree.

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson, supra,* at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "Where the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) This standard of review is applicable regardless of

whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

We have set out, *ante*, and need not repeat here, both the evidence adduced at trial and the elements that must be proven for conviction of a violation of section 12034, subdivision (c) on an aiding and abetting theory. Significantly, when viewed in the light most favorable to the judgment, the evidence showed that appellant knew Ruiz had Norteno ties and the victims had Sureno ties. He also knew Ruiz had a loaded gun with him in the car. Appellant told detectives that he thought Ruiz was crazy, and that he had an idea, when Ruiz first got in the car and started cleaning the bullets, that he was up to something. Appellant was loudly playing Northern music when he drove past the victims. Prior to the shooting, appellant learned that one of the group had purportedly shot at Ruiz's car a short time earlier. Despite this knowledge and his awareness that Ruiz was armed, appellant stopped the car. He did not drive off when Ruiz pulled the gun and asked if he should shoot, but instead remained stopped while at least three shots were fired. He did not make any attempt to warn the victims, nor did he render aid or report the shooting to the police. Moreover, he provided the means by which Ruiz left the scene, then falsely reported that his car had been stolen.

This evidence is sufficient to establish appellant's guilt as an aider and abettor. A rational trier of fact could infer the requisite intent from the facts and circumstances surrounding the crime, including appellant's presence at the crime scene, companionship with Ruiz, and conduct before and after the offense. (See *People v. Lewis, supra,* 25 Cal.4th at p. 643; *In re Juan G.* (2003) 112 Cal.App.4th 1, 5.) The fact appellant may have aided and abetted "'on the spur of the moment'" is immaterial; "advance knowledge is *not* a prerequisite for liability as an aider and abettor," as "'[a]iding and abetting may be committed … as instantaneously as the criminal act itself. [Citation.]' [Citation.]" (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 742.)

III

SENTENCING

A. Allocution

At commencement of the sentencing hearing, the trial court ascertained from defense counsel that there was no legal cause why sentence could not be pronounced and that appellant waived arraignment for judgment. Defense counsel then argued for imposition of concurrent, instead of consecutive, terms, and for a stay of the firearm discharge allegation on the ground it would result in cruel and excessive punishment. Defense counsel then informed the court that appellant wished to make a statement. The court responded that he certainly had that right, but that there was still the prospect of a trial as to the unresolved counts. This ensued:

> "THE COURT: So the reason I bring that up is your client certainly has the right to make a statement. Of course, he's subject to cross-examination by the People. So --
>
> "MR. PEREZ [defense counsel]: He withdraws that request.
>
> "THE COURT: All right. Anything else by the defense?
>
> "MR. PEREZ: No."

Appellant now says the trial court denied his federal due process rights by failing to allow him to make a statement without being subject to cross-examination.

In *People v. Evans* (2008) 44 Cal.4th 590 (*Evans*), the California Supreme Court reviewed the English common law and American underpinnings of a criminal defendant's right to make a statement in mitigation prior to sentencing.[21] (*Id.* at pp. 594-

[21] The court observed that "allocution" has traditionally meant the trial court's inquiry of a defendant whether there is any reason why judgment should not be pronounced, although the word now is often used to mean a mitigating statement by a defendant in response to the court's inquiry. (*Evans, supra*, 44 Cal.4th at p. 592, fn. 2.)

597.) The court concluded that California statutory law entitles a defendant, in response to the trial court's allocution, to make a personal statement in mitigation of punishment, but that that statement must be made under oath and be subject to cross-examination unless the court -- with the parties' consent -- chooses to allow the defendant to make a brief, unsworn statement. (*Id*. at pp. 598-599; see § 1204.) The court explicitly rejected the claim that a defendant has a due process right under the federal Constitution to make an unsworn personal statement without being subject to cross-examination, stating: "'The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."' [Citation.] California law, through section 1204, gives a criminal defendant the right at sentencing to make a *sworn* personal statement in mitigation that is *subject to cross-examination* by the prosecution. This affords the defendant a meaningful opportunity to be heard and thus does not violate any of the defendant's rights under the federal Constitution." (*Evans*, at p. 600.)

Evans is dispositive and we are, of course, bound to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Appellant says the due process claim addressed in *Evans* is different from, and narrower than, the one he raises, but we are not persuaded, especially in light of the high court's review of the history of the concept of allocution.

B. <u>Cruel and Unusual Punishment</u>

On count 4, appellant was sentenced to the middle term of five years for the violation of section 12034, subdivision (c), plus a consecutive enhancement of 25 years to life pursuant to section 12022.53, subdivision (d). He now contends that, as applied to this case and to him, the 25-year indeterminate term constitutes cruel and unusual punishment under the state and federal Constitutions. We uphold the sentence.

Section 12022.53 provides, in pertinent part: "(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in …

subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes … death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life. [¶] (e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision … (d). [¶] … [¶] (h) Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

"The legislative intent behind section 12022.53 is clear: 'The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.' (Stats. 1997, ch. 503, § 1.) With respect to aiders and abettors, … section 12022.53, subdivision (e)(1), 'is expressly drafted to extend the enhancement for gun use in any enumerated serious felony to gang members who aid and abet that offense in furtherance of the objectives of a criminal street gang.' [Citation.] This subdivision provides a 'clear expression of legislative intent' [citation] to 'severely punish aiders and abettors to crimes by a principal armed with a gun committed in furtherance of the purposes of a criminal street gang. It has done so in recognition of the serious threats posed to the citizens of California by gang members using firearms.' [Citation.]" (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172; see also *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129 [§ 12022.53 was enacted to ensure defendants who use gun remain in prison for longest time possible].)

It is against this backdrop that we analyze appellant's claim of unconstitutional punishment. Our "inquiry commences with great deference to the Legislature. Fixing

the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) "'Reviewing courts … should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.' [Citations.]" (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1213-1214.) "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.]" (*People v. Martinez, supra,* 76 Cal.App.4th at p. 494.) "'Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment. [Citations.]' [Citation.]" (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358.) A defendant must overcome a "considerable burden" when challenging a penalty as cruel or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

We turn first to an analysis under the federal Constitution.

> "The Eighth Amendment to the United States Constitution proscribes 'cruel *and* unusual punishment' and 'contains a "narrow proportionality principle" that "applies to noncapital sentences."' (*Ewing v. California* (2003) 538 U.S. 11, 20 … (lead opn. of O'Connor, J.), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 ….) That principle prohibits '"imposition of a sentence that is grossly disproportionate to the severity of the crime"' (*Ewing v. California, supra,* 538 U.S. at p. 21 … (lead opn. of O'Connor, J.), quoting *Rummel v. Estelle* (1980) 445 U.S. 263, 271 …), although in a noncapital case, successful proportionality challenges are '"exceedingly rare."' (*Ibid*.)
>
> "A proportionality analysis requires consideration of three objective criteria, which include '(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.' (*Solem v. Helm* (1983) 463 U.S. 277, 292 ….)

> But it is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality that the second and third criteria come into play. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1005 … (conc. opn. of Kennedy, J.).)" (*People v. Meeks* (2004) 123 Cal.App.4th 695, 707.)

Considering the gravity of the offense and the harshness of the penalty, we find no gross disproportionality here and, accordingly, we need not examine the second and third criteria. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1005 (conc. opn. of Kennedy, J.).) On the spur of the moment or not, appellant aided and abetted a gang-motivated shooting from a motor vehicle at three people who were close by that vehicle, and in which one of the people was shot in the chest and died. Under the circumstances, we conclude that a mandatory sentence of 25 years to life in prison for the vicarious use of a firearm in connection with a gang, does not offend the United States Constitution. (See *Harmelin v. Michigan*, *supra*, at pp. 994-995; *id*. at pp. 996-997, 1004, 1005 (conc. opn. of Kennedy, J.) [upholding imposition of mandatory term of life in prison without the possibility of parole for possession of more than 650 grams of cocaine].) As the appellate court in *People v. Riva* (2003) 112 Cal.App.4th 981, 1003, stated so succinctly, with reference to *Lockyer v. Andrade* (2003) 538 U.S. 63: "If 50 years to life for stealing $153 worth of videotapes in not cruel and unusual punishment, neither is any sentence which could legally be imposed here." (Fn. omitted.)

We now turn to an analysis under state law.

> "The California Constitution prohibits 'cruel *or* unusual punishment.' (Cal. Const., art. I, § 17, italics added.) A punishment may violate the California Constitution 'although not cruel or unusual in its method, [if] it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* [(1972)] 8 Cal.3d [410,] 424 [(*Lynch*)].)
>
> "The court in [*Lynch*] spoke of three 'techniques' the courts have used to administer this rule, (1) an examination of the 'nature of the offense and/or the offender, with particular regard to the degree of danger both

> present to society' ([*Lynch*], *supra*, 8 Cal.3d at p. 425), (2) a comparison of the challenged penalty with the punishments prescribed for more serious offenses in the same jurisdiction (*id*. at p. 426), and (3) 'a comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision' (*id*. at p. 427, italics omitted)." (*People v. Meeks, supra,* 123 Cal.App.4th at p. 709.)

Recognizing that punishment need not be shown to be disproportionate in all three respects in order to be ruled unconstitutionally excessive (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38), we look first at the nature of the offense and offender. "To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.]" (*People v. Hines* (1997) 15 Cal.4th 997, 1078.) The nature of the offense is viewed both in the abstract and with a consideration of the totality of the circumstances surrounding its actual commission. The nature of the offender focuses on the person before the court. (*People v. Martinez, supra,* 76 Cal.App.4th at p. 494.) "If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment ""'shocks the conscience and offends fundamental notions of human dignity'"" [citation], the court must invalidate the sentence as unconstitutional." (*People v. Hines, supra,* 15 Cal.4th at p. 1078; *People v. Dillon, supra,* 34 Cal.3d at p. 479.)

Here, appellant chose to associate with gang members, even after he himself was shot. On the night in question, he continued his association with one such person even upon becoming aware that person possessed a loaded firearm, and even though he suspected that person was up to something. He aided and abetted a serious crime in

which one person was killed and two others could have been. Although youthful (18 years old at the time of the shooting), appellant was legally an adult, and there was nothing to suggest he was unusually immature emotionally or intellectually. (See *People v. Dillon, supra,* 34 Cal.3d at pp. 482, 483, 486, 488; *People v. Martinez, supra,* 76 Cal.App.4th at p. 497.) His only prior criminal record consisted of a juvenile matter for which he was placed on informal probation, following which the petition was dismissed; however, this lack of a significant criminal record is not determinative. (*People v. Martinez, supra,* at p. 497.) "While [appellant's] youth and incidental criminal history are factors in his favor, they are substantially outweighed by the seriousness of the crime and the circumstances surrounding its commission …. Under the circumstances of this case, the sentence is not grossly disproportionate to the crime and does not constitute cruel and[/or] unusual punishment." (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 17.)

Appellant also asks us to compare the punishment for his offense with the statutory punishment in California for other offenses. In this regard, appellant argues that his sentence is more severe than that which would be imposed under California law on an actual killer who committed premeditated murder without using a firearm. Appellant's argument is unpersuasive because, by adding the involvement of a firearm to only one side of the equation, he is comparing apples to oranges. "[T]he Legislature determined in enacting section 12022.53 that the use of firearms in commission of the designated felonies is such a danger that, 'substantially longer prison sentences must be imposed … in order to protect our citizens and to deter violent crime.' The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives. [Citations.]" (*People v. Martinez, supra,* 76 Cal.App.4th at pp. 497-498.) The

distinction drawn by the Legislature is rational. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1231.)

Last, appellant undertakes a comparison of the punishment imposed under section 12022.53, subdivision (d) with the sentencing schemes in other states and concludes his sentence was unconstitutional because "California is unique in the harsh sentence it imposes on offenders who vicariously use firearms during the commission of their crimes." In *People v. Gonzales, supra*, 87 Cal.App.4th at pages 18-19, the Court of Appeal rejected a similar argument, stating:

> "We agree with the reasoning of the court in *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516 …, a 'Three Strikes' case: 'That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require "conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide." [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct. [¶] "[T]he needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any other state.… [¶] Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalty is not an exact science but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will. In some cases, leeway for experimentation may be permissible. Thus, the judiciary should not interfere in the process unless a statute prescribes a penalty '"out of all proportion to the offense."'" [Citations.]'
>
> "The Legislature has chosen to severely punish aiders and abettors to crimes by a principal armed with a gun committed in furtherance of the purposes of a criminal street gang. It has done so in recognition of the serious threats posed to the citizens of California by gang members using firearms. The penalty imposed on [appellant] was not out of proportion to this offense and does not constitute cruel or unusual punishment."

We agree. Although this case may properly be characterized as a tragedy and a waste with respect to appellant as well as the victim, the punishment imposed was not unconstitutionally disproportionate or excessive.

DISPOSITION

The judgment is affirmed.

_____
Levy, Acting P.J.

WE CONCUR:

_____
Dawson, J.

_____
Kane, J.